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Supreme Court, U.S.
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Nos. 00-832 & 00-843

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT TXU ELECTRIC COMPANY

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QUESTIONS PRESENTED

Under Section 224 of the Communications Act, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 224, the Federal Communications Commission has limited authority to regulate the rates, terms, and conditions of agreements between utilities and cable operators or telecommunications carriers regarding wireline pole attachments used to provide cable or telecommunications services. The questions properly presented are:

1. May the FCC, pursuant to Section 224, regulate pole attachments used to provide Internet service, which never has been determined to be either a cable or telecommunications service?

2. May the FCC, pursuant to Section 224, regulate the rates that utilities charge others for the right to affix non-wireline telecommunications equipment to utility property?

RULE 29.6 STATEMENT

TXU Electric Company, formerly known as Texas Utilities Electric Company, is a wholly-owned subsidiary of TXU Corp, formerly known as Texas Utilities Company.

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BRIEF OF RESPONDENT TXU ELECTRIC COMPANY

TXU Electric Company ("TXU Electric"), formerly known as Texas Utilities Electric Company, by counsel, hereby respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

COUNTER STATEMENT OF THE CASE

1. Procedural Posture. In Section 224 of the Communications Act, Congress provided the FCC with limited authority to regulate the rates, terms, and conditions of pole attachment agreements between utilities and either cable operators or telecommunications carriers. *See* 47 U.S.C. § 224(a)(4) & (b). For these entities, Congress established specific rate-making methodologies for pole attachments "used by a cable television system solely to provide cable service," *id.* § 224(d), and attachments used "by telecommun-

ications carriers to provide telecommunications services," *id.* § 224(e). There is no corresponding statutory rate-making methodology for attachments used for purposes other than to provide cable or telecommunications services (*e.g.*, there is no rate-making methodology for attachments used to hang advertising banners or to provide electric utility service).

In *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) ("*Implementation Order*"), the FCC relied upon its authority under Section 224 to regulate the rates charged by utilities for attachments used to provide Internet services. In addition, the FCC extended its regulation pursuant to Section 224 to include attachments used to affix wireless equipment to utility poles.

TXU Electric and a number of other utilities petitioned for review of the *Implementation Order* in several United States Courts of Appeals. These cases were consolidated in the Eleventh Circuit, which held that, because Internet service is neither a cable nor a telecommunications service, the FCC is not authorized to regulate pole attachments used to provide Internet service. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277-78 (11th Cir. 2000) ("*Gulf Power*"). In addition, the Eleventh Circuit concluded, reading Section 224 in its entirety, that the FCC has no authority to regulate attachments of wireless facilities. The United States and the Federal Communications Commission ("Federal Parties"), and the National Cable Television Association, Inc. ("NCTA") (collectively, "Petitioners") seek reversal of that decision.

2. Background. In order to provide reliable utility services to American consumers, TXU Electric and other utilities have invested substantial sums of money in the planning, construction, installation and maintenance of their distribution networks. The constituent parts of these networks, which may include power-generating facilities, power grids, conduits, wires and poles, are the property of the utilities.

Nonetheless, for decades, the utilities have leased, sold or otherwise provided pole attachment privileges to telecommunications providers, cable television companies, and various other entities, for use in their networks.

In 1978, Congress added Section 224 to the Communications Act, 47 U.S.C. § 224, which gave the FCC limited jurisdiction to ensure that the "rates, terms and conditions" of pole attachment agreements between utilities and operators of cable systems were "just and reasonable." Pub. L. No. 95-234, 92 Stat. 33 (1978). Section 224 was substantially modified by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

Under the pre-1996 Act version of the statute, a copy of which is appended hereto, Section 224 governed all rates and charges for "any attachment by a cable television system." 47 U.S.C. § 224(a)(4) (1994). Pursuant to subsection (b) of the prior statute, the FCC was to regulate the rates, terms and conditions of cable system attachments and, under subsection (d) of that statute, Congress provided a specific methodology for determining whether cable system attachments were just and reasonable.

In 1989, a cable operator filed an FCC complaint against TXU Electric (formerly known as Texas Utilities Electric Company or "TUEC") arguing that TUEC was required to charge no more than the regulated rate for pole attachments used to provide non-video services. In *Heritage Cablevision Associates of Dallas, L.P. v. TUEC*, 6 FCC Rcd 7099 (1991) ("*Heritage*"), the FCC agreed, finding that Section 224, as it then read, applied to attachments by cable system operators used either for video or non-video services, so long as the services were provided on a "commingled basis over a single network within the cable operator's franchise area." *Id.* at 7107.

On review, the United States Court of Appeals for the D.C. Circuit affirmed. *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) ("*TUEC*"). The D.C. Circuit held first that since cable services were nowhere defined in Section 224, it was "not entirely clear whether the statute place[ed] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching." 997 F.2d at 930. Given this ambiguity, and even though the FCC "certainly was not able to come up with any 'hard' evidence that Congress wanted or expected the FCC to regulate pole attachments transmitting non-video communications," the court concluded that the FCC's interpretation of the statute was reasonable. *Id.* at 933.

In the 1996 Act, Congress overhauled Section 224. First, Congress expanded the provisions of Section 224(a) to encompass not only pole attachments by cable operators, but also those of "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4). In addition, subsection 224(d) was amended to make it clear that cable systems would be entitled to subsection (d) rates only for attachments used "solely to provide cable service." *Id.* § 224(d)(3). New Section 224(e) was added to provide for FCC regulation of pole attachments "used by telecommunications carriers to provide telecommunications services." *Id.* § 224(e)(1). Finally, the Communications Act was amended such that the definitions of "cable service" and "cable system," previously found only in Title VI of the Communications Act, were incorporated into the Act generally. *See* 1996 Act, Pub. L. No. 104-104, 110 Stat. 56, § 3(36) & (37).

3. The FCC Decision. In the *Implementation Order*, the FCC concluded that the 1996 Act did not "overrule" its earlier *Heritage* decision. 13 FCC Rcd at 6793-94. To the contrary, relying on the rationale accepted by the D.C. Circuit in *TUEC*, the FCC concluded that the application of Section 224 still turns upon the identity of the entity seeking

attachment rather than the nature and use of the attached facilities. *Id.* Thus, notwithstanding its conclusion that Internet service is not a "telecommunications service" under Section 224(e), and although it declined to determine whether Internet service is a "cable service," the FCC held that cable operators are entitled to the Section 224(d) cable rate for attachments used to provide Internet service. *Id.* at 6794-95. Similarly, the FCC concluded that telecommunications carriers are entitled to regulated attachment rates under Section 224 even when they affix wireless telecommunications equipment to utility poles. *Id.* at 6798-99.

4. The Eleventh Circuit Decision. In the decision below, the Eleventh Circuit held that the FCC's decision regarding its authority to regulate pole attachments used for Internet services was based on a flawed interpretation of Section 224. First, the court noted that the changes made to Section 224 in 1996 made it clear that the statute now "emphasizes the type of service" being provided on attached facilities rather than the type of entity seeking the attachment. 208 F.3d at 1276 n.32. As a result, the court found "no need to follow the reasoning of [*TUEC*]." *Id.*

Then, addressing the statute directly, the court noted that, "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service . . . , Internet service must qualify as either a cable service or a telecommunications service." *Id.* Following an extensive review of Section 224, the legislative history of the provision, and the FCC's prior treatment of Internet services, the court concluded that Internet services are not "cable services" under the Communications Act. *Id.* at 1277.[1] Further, it found no basis to

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[1] "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programmer services, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. §§ 153(6), 522(6).

question the FCC's conclusion that Internet services are not "telecommunications services."[2] In sum, "Congress . . . authorized the FCC to develop rent formulas for attachments providing cable and telecommunications services. Internet service does not meet the definition of either a cable service or a telecommunications service. Therefore, the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service." *Id.* at 1277-78.

With respect to attachments used to affix wireless equipment to utility poles, the court rejected the FCC's expansive reading of Section 224(a), which would give the FCC authority to regulate any attachment made by a cable or telecommunications carrier "no matter the nature of the facility being attached." *Id.* at 1273. Instead, the court focused on the plain language of the statute and the purpose of the original Pole Attachment Act to conclude that the FCC has no authority under Section 224 to regulate the attachment of antennas or other wireless telecommunications equipment to utility property. *Id.* at 1273-75.

ARGUMENT

What an odd statute the Petitioners believe Congress to have conceived. Relying on subsections (a) and (b) of Section 224, Petitioners maintain that the FCC's authority to regulate the pole attachments of cable operators and telecommunications carriers is virtually limitless—*at least so long as the attachments are not used for services that actually fall within the FCC's ordinary jurisdiction, i.e.,* cable or telecommunications services, in which case subsections (d) and (e) of the statute constrain the FCC's rate making authority.

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[2] "Telecommunications" is defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

If, on the other hand, a cable operator or a telecommunications carrier elects to affix facilities to a utility pole for some other purpose, Petitioners maintain, the FCC's authority is unfettered by statutory rate formulas. In that case, the FCC may (and indeed must, because Section 224(b) is phrased in mandatory terms) regulate the rates for the equipment so affixed, and it may use any rate-making methodology that it chooses.

Thus, in this case, Petitioners tell the Court, the FCC is required to regulate cable operator pole attachments used to provide Internet services, even though the FCC never has classified Internet service either as a cable or a telecommunications service. Similarly, Petitioners argue that the FCC's Section 224 authority extends to wireless equipment, even though such equipment never has been regarded as a "pole attachment," and the ratemaking provisions of the Act itself are phrased in terms of wireline attachments. The Eleventh Circuit properly rejected this overly broad interpretation of Section 224 and this Court should likewise.

I. SECTION 224 DOES NOT GOVERN POLE ATTACHMENTS USED TO PROVIDE INTERNET SERVICES.

Both NCTA and the Federal Parties begin by repeating the familiar principle that statutory construction begins with the language of the statute and "where the statutory language provides a clear answer, it ends there as well." Federal Parties Br. at 16; NCTA Br. at 27. NCTA and the Federal Parties, however, then proceed to ignore the clear import of all but the first two subsections of Section 224, gloss over the substantial changes made to Section 224 in 1996, and attempt to create ambiguity where none exists. Based on the ambiguity that they have read into the statute, Petitioners conclude by arguing that the Court should defer to the FCC's

interpretation of Section 224, which conferred upon itself vast authority to regulate pole attachments used to provide services that it does not otherwise regulate. Such deference is unwarranted, however, as the decision below gave effect to the plain meaning of Section 224.

A. Section 224, By Its Terms, Governs Only Attachments Used For Cable Or Telecommunications Services.

1. The Petitioners begin by arguing that the definition of a "pole attachment" in subsection 224(a)(4) does not depend upon the service being provided. The Petitioners then focus on subsection 224(b)(1), which requires the FCC to ensure that pole attachment rates are "just and reasonable." *See* Federal Parties Br. at 15-19; NCTA Br. at 27-28. At this point, Petitioners' analysis all but stops and they conclude that subsections (a) & (b) permit, and in fact require (because subsection (b)(1) is mandatory), the FCC to regulate the rates, terms, and conditions of any and all pole attachments by cable operators or telecommunications carriers without regard to the purpose of the attachment. *See, e.g.*, Federal Parties Br. at 15-16 ("if an item is an 'attachment by a cable television system'" . . . "the FCC has jurisdiction to regulate the 'rates, terms, and conditions' for it").

Subsections (a)(4) and (b)(1) of Section 224, should not, however, be read in a vacuum. It is a "cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). When considered in its entirety, Section 224 simply cannot accommodate the Petitioners' construction.

Subsection 224(a) defines some of the terms used in the Section. Subsection 224(a)(4), for example, defines the entities entitled to regulated rates under the statute: cable operators and telecommunications carriers. Subsection 224(b) confers upon the FCC jurisdiction to ensure that rates,

terms, and conditions of covered pole attachment agreements are just and reasonable. Subsections 224(d) and (e) expand upon subsection 224(b) by defining precisely the rate methodologies that the FCC is to use: subsection 224(d) establishes a specific formula for the rates applicable to pole attachments "used by a cable television system solely to provide cable service"; subsection 224(e) "govern[s] the charges for pole attachments used by telecommunication carriers to provide telecommunications services."

When read as a whole, each of the subsections of Section 224 offers meaning in relation to the others. Two types of services are entitled to two different rate-making methodologies, which in turn correspond to the two types of entities covered by the statute. Telecommunications carriers are entitled to the telecommunications rate for telecommunications attachments, and cable operators are entitled to the cable rate for attachments used to provide cable services. When a cable operator begins providing telecommunications services, it will be charged the same rate as its telecommunications competitors. No class of entities is favored over any other class of entities providing like-services, and the statute is internally consistent.

In its decision, the Eleventh Circuit recognized as much, noting that "[t]he straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." *Gulf Power*, 208 F.3d at 1276 n.29.

2. For this reason, the continued reliance by the Federal Parties and NCTA on the D.C. Circuit's decision in *TUEC* is misplaced. *See* Federal Parties Br. at 22-23, NCTA Br. at 30. In *TUEC*, the D.C. Circuit affirmed the FCC's interpretation of an earlier version of Section 224. Far from finding the FCC's interpretation required by the language of the prior

version of Section 224, however, the D.C. Circuit merely acknowledged that the FCC's interpretation was reasonable given that it was "not entirely clear whether the statute place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching." *TUEC*, 997 F.2d at 930.

As noted above, however, there have been important changes in the text of Section 224 since the *TUEC* decision was handed down. Most importantly, it is quite clear now—as the Eleventh Circuit recognized—that the statute emphasizes the type of service being distributed over an attachment as opposed to the type of entity doing the attaching. *See* 208 F.3d at 1276 n. 32. Indeed, the Federal Parties and NCTA recognize that attachments used for different services now are entitled to different rates, even when the services are provided by the same entity. *See* Federal Parties Br. at 22-24; NCTA Br. at 34. Pole attachments used to provide telecommunications service now are entitled to the 224(e) telecommunications rate. Pole attachments used to provide cable services are entitled to the 224(d) cable rate. Pole attachments used for non-cable or non-telecommunications purposes, however, are not regulated by the FCC—even if the attaching entity happens to be a cable operator or a telecommunications carrier.

B. Petitioners Interpretation Of Section 224 Is Overly Broad.

1. Under the Petitioners' interpretation, the FCC is required by subsection 224(b)(1) to regulate all pole attachments by cable operators and telecommunications carriers, whatever the purpose of the attachment. *E.g.*, Federal Parties. Br. at 15-16, 19 ("'*Any* attachment' to a utility pole by a cable television system . . . is protected by the Act") (emphasis in original). If that were the case, the FCC's jurisdiction under Section 224 would have no

limit—the FCC would be obligated under Sections 224(a) & (b) to regulate pole attachments by a cable operator used to provide an electric utility service, or to hang advertising banners, or to mount light fixtures, even though those activities would otherwise be completely outside of the FCC's jurisdiction.

Indeed, under the Petitioners' interpretation, the FCC would have broader discretion to regulate attachments used to provide services that it normally does not regulate—such as Internet services or electric utility services—than it has to regulate attachments used for cable or telecommunications service, which are subject to the specific provisions of subsections (d) and (e). The Federal Parties, for example, argue that:

> Section 224(b)(1) expressly authorizes the FCC to ensure 'just and reasonable' rates for all items defined as 'pole attachments' in Section 224(a)(4)—even those that fall outside the categories in Section 224(d) and (e). For attachments by a cable television system that fall outside those categories, Congress has not further specified the content of the rates.

Federal Parties Br. at 26.

That is, Petitioners suppose that Congress constrained the FCC's authority to regulate the rates charged for pole attachments used to provide services that are within the FCC's jurisdiction, while requiring the FCC to regulate attachments used to provide other services, but leaving its discretion to do so unfettered. It is a familiar canon of construction that such absurd interpretations are to be avoided. *See, e.g., United States v. American Trucking Assn.*, 310 U.S. 534, 542-43 (1940); *cf. Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment) (when confronted "with a statute which, if interpreted literally, produces an absurd . . . result[,] [the Court's] task is to give some alternative meaning" to the statute).

2. Not only does Petitioners' interpretation result in an absurdity, it also renders meaningless important terms in the statute. Contrary to the odd claim that "[t]he relevant language of Section 224, as amended by the 1996 Act, is exactly the same language interpreted by the FCC in *Heritage* and affirmed by the D.C. Circuit," NCTA Br. at 40, the "relevant language" was amended in at least two important respects in 1996, eliminating the ambiguity the *TUEC* court faced.[3] As a result of these changes, the Eleventh Circuit faced, "an entirely different situation from that faced by the D.C. Circuit in [*TUEC*]." *Gulf Power*, 208 F.3d at 1276 n.32.

First, in 1996 Congress incorporated into the Communications Act generally the definitions of "cable service" and "cable system" previously found only in Section 602 of the Act. *See* 47 U.S.C § 153(7) & (8). Thus, whereas the D.C. Circuit confronted a statute in which "the congressional intent [was] far from clear" regarding the precise meaning of the important terms used in Section 224, *TUEC*, 997 F.2d at 931, there no longer can be any doubt that the terms "cable service" and "cable system" have the same meaning in Section 224 as they have in the remainder of the Act. Moreover, whereas the D.C. Circuit could not determine whether the prior version of Section 224 "place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching," *TUEC*, 997 F.2d at 930, the FCC's pole attachment rate making authority now is clearly phrased in terms of pole attachments used for specific and statutorily defined terms. *See Gulf Power*, 208 F.3d at 1276 n.32.

Second, Petitioners ignore the fact that subsection 224(d) was amended in the 1996 Act to provide that the "cable" rate

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[3] Petitioners' suggestion, therefore, that the Eleventh Circuit decision involved an "implied repeal," NCTA Br. at 36-39, is inapposite. When Congress changes a law, courts must give effect to those changes.

methodology should apply to attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3). The addition of the word "solely" to the statute cannot be attributed to anything but a deliberate effort to limit subsection (d) rates only to attachments used for "cable services." The text could not be more clear. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *E.g.*, *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

Yet, according to Petitioners, Congress did not mean what it said at all. Petitioners claim that the addition of the word "solely" to subsection (d) somehow "grandfathered" cable systems into the preexisting rate structure unless they begin to provide telecommunications service, in which case they would be subject to the (e) rate. *E.g.*, NCTA Br. at 18.[4] Thus, under the Petitioners' interpretation, subsection (d) cable rates can be applied not only to attachments used for cable services, but also to any other attachment so long as it is not used for telecommunications service. Such a construction, in which "solely" does not mean "only" and "cable service" does not have the same meaning in subsection 224(d) that it has in the remainder of the Communications Act, simply cannot be squared with the terms of the statute.[5]

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[4] In making this argument, NCTA includes the word "grandfathered" within quotation marks while citing to Section 224(d)(3). NCTA Br. at 18. The term "grandfathered," however, appears nowhere in Section 224(d)(3), any other part of 224, or in the legislative history of the 1996 Amendments regarding Section 224.

[5] NCTA notes the familiar presumption that Congress is aware of previous judicial and administrative constructions when it amends a statute. *See* NCTA Br. at 28-29. That is no doubt a fair presumption, just as it is fair to say that Section 224 was amended to remedy a regulatory anomaly created by the earlier *TUEC* decision. *See* Brief of United States Telecom Ass'n, *et al.*, at 13 (policy of the 1996 Act was to end "discriminatory treatment of competitors based on what facilities they use"). Petitioners' position, however, is that Congress only did half the

No such convoluted construction of the statute is required, however, as the text accommodates a much more sensible interpretation. Congress intended for all competitors to have similar attachment rights for similar services. Telecommunications carriers are entitled to the subsection (e) telecommunications rate for pole attachments used to provide telecommunications services.[6] Conversely, cable operators are entitled to the subsection (d) cable rate for attachments used to provide cable services. However, just as others who may seek to provide non-cable or non-telecommunications services (*e.g.*, Internet service) are not entitled to regulated pole attachment rates, cable providers must pay a market rate when they enter markets for such non-covered services.

C. Petitioners Mischaracterize The Eleventh Circuit's Decision.

1. Both the Federal Parties and NCTA go to great lengths to claim that the Eleventh Circuit's decision is inconsistent with Congress's intent to "encourage the rapid development of inexpensive broadband Internet access." *See, e.g.*, Federal Parties Br. at 20. Indeed, NCTA goes so far as to claim that the Eleventh Circuit's decision would "penalize cable entities that choose to expand their services." NCTA Br. at 32.

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job because, although it leveled the field as between cable operators and telecommunications carriers, it left those two classes of entities with favored pole attachment rights vis-a-vis all others when they compete in any other market against any other class of entities. One should perhaps not presume that Congress is quite so inept.

[6] Contrary to the implication in the brief of Respondent WorldCom, Inc., the decision below does not in any way suggest that a telecommunications carrier would lose its Section 224(e) attachment rights if one of its customers provides Internet services. In that case, the attaching carrier is providing a telecommunications service to an Internet service provider.

The Court should not be misled. The decision below does not penalize cable operators who choose to compete in the Internet services market. Rather, as both NCTA and the Federal Parties recognize, there is a vibrant and rapidly growing market for the provision of high speed broadband services. *See* NCTA Br. at 7-8 ("the cable industry actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide"); Federal Parties Br. at 21 (there is a "market for broadband Internet access"). Contrary to the rhetoric in the Petitioners' briefs, the court's decision below merely puts cable operators on the same footing, *vis-a-vis* their pole attachments, as other providers of Internet services.

2. Indeed, to accept Petitioners' theory, the Court would have to believe that Congress intended to provide cable operators, while they are "actively compet[ing] against numerous segments of the communications industry to provide high-speed Internet services," with preferential pole attachment rates that are not available to non-cable Internet service providers. Although NCTA no doubt would prefer such a regulatory regime, there is no reason to believe that requiring cable operators to compete on a level field with others will discourage them from providing Internet service.

D. This FCC Avoided The Critical Issue And, Accordingly, Its Interpretation Of Section 224 Is Entitled To No Deference.

1. The Eleventh Circuit correctly held that in order to receive the regulated rate under Section 224, Internet services must be classified as either cable or telecommunications services. As the appellate court explained below, the FCC's regulatory authority under Section 224 is limited to pole attachments used to provide services that fall within the FCC's normal regulatory ambit, *i.e.*, cable and telecommunications services. The FCC may not dodge that initial definitional question, make no finding as to how a

particular service should be classified, and then assert jurisdiction over an attachment used to provide the still-undefined service simply because the attachment has been made by one of the FCC's constituents, *e.g.*, a cable operator. Finding no evidence that the FCC had defined Internet services as either a cable or telecommunications service, the appellate court refused to allow Section 224 to govern Internet service rates.

2. In order to determine the lawfulness of the FCC's assertion of jurisdiction in this case, the lower court felt obliged to engage in its own analysis of whether Internet services may be classified as either a cable or a telecommunications service. The court began by noting that, in the *Implementation Order*, the FCC itself concluded that Internet service is not a "telecommunications service." 13 FCC Rcd at 6794-95; *see also In Re* Fed.-State Joint Bd. on Universal Serv., 12 FCC Rcd 87 69 (1996) ("Internet service does not meet the statutory definition of a 'telecommunication service' under the 1996 Act"). The Eleventh Circuit said no more than that it did not question the FCC's conclusion. *Gulf Power*, 208 F.3d at 1276-77.

As to whether Internet services are cable services, the court again noted that the FCC had defined "Internet" services otherwise, *id.* at 1277 (citing *Federal-State Joint Bd. on Universal Service*, 13 FCC Rcd 11501, 66 (1998) ("Internet service providers themselves provide information services . . ."). After reviewing the statutory definitions, the Eleventh Circuit found no reason to question that determination. As various *amici* point out, the Eleventh Circuit's analysis on this issue cannot seriously be questioned since Internet is not "one-way-transmission," "'video-programming' or 'other programming'" under the definition of cable services found in Section 602 of the Act. Consumers Union Br. at 5; *see also*

USTA Br. at 19 ("cable-offered high-speed Internet access service is, at a minimum, not 'solely' a cable service").[7]

Finding no evidence that the FCC had defined Internet services either as cable or telecommunications services and no reason that it would be compelled to do so, the appellate court rejected the FCC's assertion of authority to regulate pole attachments used to provide Internet services.

3. The FCC's failure to classify Internet services also undermines Petitioners' insistence that the Court defer to the FCC's interpretation of Section 224. If this case involved a challenge to an FCC finding that Internet services should be classified as "cable services" under the Communications Act, *Chevron* deference to the agency's interpretation might be appropriate. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (courts should defer to agency interpretations of the statutes they are entrusted to administer).

Here, however, the FCC did not so much interpret the statute as attempt to write itself a new one, more to its liking, that would give the FCC authority to regulate pole attachments having nothing to do with telecommunications, cable service, or for that matter, any other service within the ambit of FCC regulation. For, if the FCC's logic were to hold, it would have the virtually unbridled authority and the duty to regulate pole attachments for the provision of electrical or other utility services every bit as much as it claims to have authority to regulate attachments for Internet services. No fair reading of the statute can justify such an expansive determination of a congressional delegation of

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[7] The Eleventh Circuit's decision on this point also is consistent with the decision of the United States Court of Appeals for the Ninth Circuit in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876-77 (9th Cir. 2000), in which that court noted that Internet service never has been found to be "cable service."

authority to the agency. The matter, moreover, of whether the statute reflects such an enormous delegation of authority to the FCC over matters unrelated to any aspect of the agency's normal regulatory responsibility or expertise, is precisely the kind of legal issue best resolved by an impartial court. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("precondition to deference under *Chevron* is a congressional delegation of administrative authority").

II. SECTION 224 DOES NOT GOVERN THE ATTACHMENT OF WIRELESS FACILITIES TO UTILITY PROPERTY.

1. For many of the same reasons set forth above, Section 224 plainly does not reach attachments for wireless equipment. In an effort to argue the contrary, the Federal Parties, and particularly the Association for Local Telecommunications Services, *et al.* ("ALTS") as *amici*, have mischaracterized the court's holding regarding antennae and other wireless equipment affixed to utility poles. For example, the Federal Parties suggest that the Eleventh Circuit's decision excludes *all* attachments by wireless telecommunications carriers from the terms of Section 224. Federal Parties Br. at 31-36; *see also* ALTS Br. at 10 ("no basis for excluding wireless telecommunications carriers" from Section 224 coverage).

Neither the statute nor the court's opinion below, however, suggests that wireless carriers have any less protection than wireline carriers—*for wireline pole attachments* as defined in Section 224(a). *See Gulf Power*, 208 F.3d at 1274-75 (affixing non-wireline equipment not a "pole attachment" as term used in Section 224). The Eleventh Circuit's decision merely recognizes that the statute does not reach wireless facilities affixed to poles *by any party*.

Indeed, as the Federal Parties concede, wireless carriers, too, sometimes require wired connections. *See* Federal

Parties Br. at 34-35. When they require such wired connections, they are afforded precisely the same pole attachment rights as any other telecommunications carrier.[8] Thus, again, it is not the identity of the party, but the nature of the attachment that determines whether or not Section 224 is applicable. With respect to wireless facilities affixed to utility property, the Eleventh Circuit properly held that, because poles most certainly are not "bottleneck facilities for wireless" equipment, and the Pole Attachment Act was never intended to reach any thing other than wireline attachments, Section 224 is inapplicable. *Gulf Power*, 208 F.3d at 1275.

2. The plain language of the statute supports the lower court's conclusion. Subsections 224(d) and 224(e), provide two specific pole attachment rate formulas, each of which involves a calculation of the "usable space" on the facilities subject to the attachment. The statute further defines "usable space" as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). The statutory rate formulas provide no guidance as to how utilities (or the FCC) are to apportion costs or establish rates for the attachment of wireless equipment to utility property—wireless facilities simply are not contemplated by the statute.

3. Unable to refute the inherent logic of the Eleventh Circuit's decision or to deny the specific intent of Congress as evidenced by the statutory text, ALTS mistakenly suggests that utility poles are an essential facility for wireless equipment siting. *See* ALTS Br. at 16-18. That suggestion

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[8] The Federal Parties suggest that there is some dispute on this point. *See* Federal Parties Br. at 35 ("perhaps the decision [below] may be construed not to exclude a wireless carrier's wireline facilities from the scope of Section 224"). In fact, no party ever has contested the proposition that wireless carriers are entitled to Section 224(e) rates for their wireline telecommunications attachments.

does not bear the test of common sense. Whatever one may believe regarding the use of utility poles for wireline facilities, utility poles most assuredly are not essential for wireless equipment. Federal and state governments, private building owners, and tower owners—including telecommunications carriers themselves—all lease space on their structures for wireless facilities.[9] Yet none of these other entities is subject to any restriction on the rates that they may charge for the installation of wireless equipment. No cogent theory has been offered as to why Congress would have singled out utilities for such a restriction.

CONCLUSION

The decision of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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[9] *See, e.g., NPS Turning Page In Saga Of Tower Siting On Federal Property*, Mobile Phone News (July 6, 1998) ("GSA has signed leases with industry to place antennas on the rooftops of 67 government-owned buildings for annual fees totaling more than $1 million"); *Rooftop Siting Requires Landlords To Develop Telecom Knowledge*, Radio Communications Report (May 15, 2000) ("rooftops have grown increasingly desirable in recent years" for antenna siting); *Tower Construction Enjoys Growth Spurt*, Radio Communications Report (July 24, 2000) (tower owners "riding the wave of the booming wireless market").

APPENDIX

APPENDIX

47 U.S.C. § 224 (1994). Regulation of Pole Attachments

(a) As used in this section:

(1) The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b) (1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedure established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) (1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issues and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) (1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.